

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**CONSTANCE D. NIBARGER**

Claimant

VS.

**THE BOEING COMPANY**

Respondent

AND

**INSURANCE COMPANY**

**STATE OF PENNSYLVANIA**

Insurance Carrier

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Docket No. 268,671

**ORDER**

Respondent and its insurance carrier appealed the June 23, 2005, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on November 18, 2005, in Wichita, Kansas.

**APPEARANCES**

Dale Slape of Wichita, Kansas, appeared for claimant. Kim R. Martens of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record also includes the Stipulation and Agreement filed with the Division of Workers Compensation on December 15, 2004; the Stipulated Order filed on January 18, 2005; and the Stipulation and Agreement filed on April 28, 2005.

**ISSUES**

Claimant alleges she sustained repetitive trauma injuries to her mid and upper back, both shoulders, both upper extremities and her neck due to the work she performed for respondent from August 3, 2001, through October 2002. Respondent and its insurance carrier admit that claimant injured her right shoulder in August 2001, but they deny claimant injured any other parts of her body during the period of alleged accident. In the June 23,

2005, Award, Judge Clark adopted the functional impairment rating provided by the court-appointed independent medical examiner, Dr. Philip R. Mills, and found that claimant sustained an eight percent whole person functional impairment due to the work she performed for respondent. Accordingly, the Judge awarded claimant, who continued to work for respondent at the time of regular hearing, permanent disability benefits under K.S.A. 44-510e for an eight percent permanent partial general disability.

Respondent and its insurance carrier argue that claimant's permanent disability benefits should be awarded under K.S.A. 44-510d for a right upper extremity injury. They point out that Dr. Mills' initial report only rated claimant as having an 11 percent permanent partial impairment of the right upper extremity, and it was only following a communication with claimant's counsel that Dr. Mills assigned claimant a one percent whole person impairment for overuse myofascial pain syndrome. Respondent and its insurance carrier contend claimant failed to prove her myofascial pain syndrome was either caused or permanently aggravated by the work she performed for respondent during the alleged period of accident. In short, respondent and its insurance carrier request the Board to grant claimant permanent disability benefits for an 11 percent permanent disability to her right upper extremity under the schedule of K.S.A. 44-510d.

Conversely, claimant argues the more persuasive medical evidence in this case is offered by claimant's examining physicians, Dr. Pedro A. Murati and Dr. George G. Fluter. Accordingly, claimant requests that she be awarded permanent partial general disability benefits under K.S.A. 44-510e. Claimant argues she has either a 22 percent or 18 percent whole person functional impairment as determined by Dr. Murati and Dr. Fluter, respectively.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the June 23, 2005, Award should be affirmed.

Claimant began working for respondent in 1987 and, at the time of the regular hearing, was still employed there. On August 13, 2001, claimant went to respondent's Central Medical and reported that for the past 10 days she had been periodically experiencing right shoulder pain. Claimant attributed her symptoms to her work, which included repetitive activities, with a lot of pushing, pulling and cleaning.

Claimant was referred to Dr. J. Mark Melhorn, who recommended conservative treatment for her shoulder pain. Despite trigger point injections to her right shoulder and

neck, claimant's symptoms worsened as she began having discomfort down her arm. In December 2001, claimant was complaining of problems with her right elbow. By the summer of 2002, claimant had begun having symptoms in her left shoulder, down her left arm and into her hands. In October 2002, Dr. Melhorn recommended ulnar nerve elbow surgery, which he thought might decrease the symptoms in claimant's shoulder and neck area. Claimant, however, declined surgery at that time because she had been moved to a different job that caused less discomfort. Accordingly, claimant last saw Dr. Melhorn on October 24, 2002.

Dr. Pedro A. Murati examined claimant on February 20, 2003, at the request of claimant's attorney. At that visit, claimant complained of having pain in both wrists (right greater than left), pain in both shoulders (right greater than left), neck pain and mid-back pain. Dr. Murati diagnosed right carpal tunnel syndrome, left carpal tunnel syndrome, left de Quervain's, myofascial pain syndrome affecting the bilateral shoulder girdles, neck and thoracic musculature and right shoulder strain with mild AC crepitus. Dr. Murati believed claimant's injuries were the direct result of her work-related activities occurring from August 3, 2001, through October 2002.

Using the AMA *Guides*,<sup>1</sup> Dr. Murati rated claimant as having a 10 percent impairment to her right upper extremity due to the wrist pain from carpal tunnel syndrome and a three percent impairment for the right shoulder pain secondary to mild crepitus, which combine for a 13 percent right upper extremity impairment (or eight percent whole person impairment). The doctor rated claimant as having a 10 percent impairment to the left upper extremity for the left wrist pain secondary to carpal tunnel syndrome and a two percent impairment for the left thumb, which combine for a 12 percent impairment to the left upper extremity (or seven percent whole person impairment). The doctor also rated claimant's myofascial pain syndrome in her cervical spine as constituting a five percent whole person impairment. And, likewise, Dr. Murati rated the myofascial pain syndrome in claimant's thoracic spine at five percent to the whole person. Dr. Murati combined all of the above ratings for a 22 percent whole person permanent partial impairment. Dr. Murati testified he was not able to say whether any of that impairment existed before August 2001.

Judge Clark initially selected Dr. C. Reiff Brown to examine and evaluate claimant. But certain difficulties arose with that evaluation as the doctor advised Judge Clark he was unaware he was evaluating claimant as part of a court-ordered independent medical evaluation. Consequently, Judge Clark then selected Dr. Philip R. Mills to examine and evaluate claimant. Dr. Mills, who is a specialist in physical medicine and rehabilitation,

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

examined claimant in November 2003 and diagnosed, among other things, myofascial type pain secondary to overuse syndrome, possible bilateral carpal tunnel syndrome with the right more symptomatic than the left, possible right ulnar neuropathy, and medial epicondylitis. In his November 20, 2003, report to Judge Clark, Dr. Mills wrote, in part:

Based upon the available information, to a reasonable degree of medical probability, the patient's original shoulder injury occurred in the early 1990s. She has had waxing and waning symptomatology since that time, depending on her work activities. Her upper extremity problem in the hands appears to be a minimal carpal tunnel syndrome and this is undoubtedly related to her underlying diabetes and is probably the earliest sign of a mild peripheral polyneuropathy. The medial epicondylitis is probably secondary to her work activity and is not particularly new. The myofascial pain syndrome in the shoulders and neck has been present for some time and is probably made worse by the buffalo hump which she has, so when she has any prolonged or repetitious neck forward flexion she has a flare up of her symptomatology.<sup>2</sup>

Dr. Mills did not initially rate claimant as he desired nerve conduction studies to verify whether claimant had carpal tunnel syndrome, ulnar neuropathy, or both. The doctor also indicated he believed claimant had already received a settlement for her shoulder problems, which he felt should also be considered.

After seeing claimant again in February 2004 and performing the nerve conduction studies, Dr. Mills concluded claimant had myofascial pain syndrome with overuse, medial epicondylitis, and the symptoms of right carpal tunnel syndrome. By letter dated May 17, 2004, the doctor wrote Judge Clark that claimant had a 10 percent impairment to her right upper extremity for carpal tunnel syndrome and a one percent impairment for medial epicondylitis, which comprised an 11 percent permanent functional impairment to the right upper extremity. In December 2004, however, Dr. Mills sent another letter to Judge Clark to supplement his opinion regarding claimant's functional impairment, which the doctor believed included a one percent whole person impairment due to claimant's myofascial pain syndrome. Accordingly, Dr. Mills' final opinion was that claimant had an eight percent whole person functional impairment when the 11 percent right upper extremity impairment from the carpal tunnel syndrome and medial epicondylitis was combined with the one percent whole person impairment from the myofascial pain syndrome.

Dr. Mills testified twice. The doctor initially testified that claimant's myofascial pain syndrome in her neck and shoulders was most likely permanently aggravated by the repetitive work she performed for respondent through October 2002. Although at times the

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<sup>2</sup> Mills Depo. (Jan. 19, 2005), Ex. 2.

doctor seemed to contradict himself, the gist of the doctor's testimony was that claimant's repetitive work activities continued to aggravate her myofascial pain syndrome.

And I tried to, I tried to articulate it, not very well, being a doctor, that's what I was trying to say. You have a pre-existing problem and then you have this gradual increasing that seems to have permanently aggravated this underlying pre-existing problem. But not sufficiently that it would have changed it numerically from a, from a percentage before and after. But it nonetheless made it worse by some, it would be difficult to determine but by some amount.<sup>3</sup>

Claimant also presented the testimony of Dr. George G. Flutter, who is board-certified in physical medicine and rehabilitation. Dr. Flutter examined claimant in June 2004, at the request of claimant's attorney. The doctor diagnosed, among other maladies that are not part of this claim, chronic right shoulder pain, chronic bilateral upper extremity pain, right medial epicondylitis, chronic neck pain, borderline to mild right carpal tunnel syndrome, probable left ulnar neuropathy, and myofascial pain.

Dr. Flutter believes claimant's work activities after July or August 2001 caused her to develop mild right carpal tunnel syndrome, left ulnar neuropathy, and medial epicondylitis at the right elbow. In addition, the doctor believes claimant aggravated the myofascial pain syndrome that now exists in both shoulder girdles and her neck. Using the *AMA Guides*, the doctor rated claimant as having a 23 percent whole person functional impairment, five percent of which represented the impairment to claimant's low back which the parties agreed was not relevant to this claim.

At her deposition, claimant denied any left shoulder problems before August 2001. But in reviewing chiropractic notes from a Dr. Reno, Dr. Flutter noted the chiropractor mentioned "shoulders" in a June 1993 note and that pain diagrams showed markings in the left shoulder and neck area on July 1, 1993; July 27, 1993; August 3, 1993; February 3, 1994; and February 10, 1994.

This claim demonstrates the difficulties often encountered in diagnosing, treating, and rating repetitive trauma injuries, as well as determining when those injuries begin and end. The Board finds it is more probably true than not that claimant sustained repetitive mini-traumas due to her work activities from August 2001 through October 2002. The Board affirms the Judge's finding that claimant now has an eight percent whole person functional impairment due to the injury and permanent aggravation that claimant sustained. The evidence establishes that claimant's job duties required repetitive activities and that claimant experienced both new and increased symptoms due to the work she performed for respondent during the period of alleged accident.

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<sup>3</sup> Mills Depo. (Jan. 19, 2005) at 31.

The June 23, 2005, Award is affirmed. The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated June 23, 2005, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale Slape, Attorney for Claimant  
Kim R. Martens, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director